

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

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|---------------------|---|---------------------------|
| BERTHA PEREZ |) | |
| Claimant |) | |
| |) | |
| VS. |) | Docket No. 220,062 |
| |) | |
| IBP, INC. |) | |
| Respondent |) | |
| Self Insured |) | |

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Pamela J. Fuller on April 18, 2001. The Board heard oral argument October 23, 2001. Jeff K. Cooper was appointed Board Member Pro Tem to serve in place of Board Member Gary M. Korte who recused himself from this proceeding.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared on behalf of claimant. Wendel W. Wurst of Garden City, Kansas, appeared on behalf of respondent, a qualified self-insured.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded benefits for an 8 percent permanent partial general disability based on a whole body functional impairment. Claimant does not seek a work disability but argues the award should be based on a higher functional impairment. The extent of claimant's functional impairment is the only issue on appeal.

FINDINGS OF FACT

After reviewing the record and considering the arguments, the Board concludes the Award should be affirmed.

The parties have stipulated that claimant met with personal injury by accident arising out of and in the course of her employment on December 4, 1995. The injuries arise from repetitive work activities and claimant reported symptoms in her shoulders, the back of her neck, her right elbow, right wrist, right hand, her mid back, and her left arm and hand. Claimant received treatment from Dr. Myron G. Zeller, Dr. Gary M. Kramer, and ultimately Dr. C. Reiff Brown.

Dr. Brown diagnosed cervical and thoracic strain with possible mild myofascial pain syndrome in those areas. He further diagnosed mild lateral humeral epicondylitis on the right and mild carpal tunnel syndrome bilaterally most severe on the right. He rated the permanent impairment as 5 percent of each upper extremity on the basis of the carpal tunnel syndrome and an additional 1 percent of the right upper extremity on the basis of the lateral epicondylitis or 7 percent whole person. These ratings were based on the Third Edition (Revised) of the *AMA Guides*.

Claimant was also examined and her impairment rated by Drs. Paul Rodriguez and Sergio Delgado. Dr. Rodriguez saw claimant on March 18, 1999, at the request of claimant's counsel. Dr. Rodriguez diagnosed injury to claimant's neck, shoulders, back, arms and hands. He rated the impairment as 5 percent for the lumbar and cervical spine, each, 18 percent for the left shoulder, 17 percent for the right shoulder or 31 percent whole person. These ratings were based on the Fourth Edition of the *AMA Guides*.

Claimant was examined and her impairment rated by Dr. Rodriguez a second time on April 9, 2000. Dr. Rodriguez again diagnosed injury to claimant's neck, shoulders, back, arms and hands. He rated the impairment as 10 percent for the lumbosacral spine, 6 percent for the cervical spine, 18 percent for the left shoulder, 17 percent for the right shoulder and 10 percent to the right hand or 35 percent whole person. The ratings were based on the Third Edition, (Revised) of the *AMA Guides*.

Dr. Delgado saw claimant on October 20, 1999, for an independent medical examination at the Administrative Law Judge's request. Dr. Delgado diagnosed myofascial complaints related to the shoulder or cervicothoracic region of the neck and mild median nerve entrapment of the right wrist. He rated the impairment as 5 percent for the cervicothoracic myofascial complaints and 5 percent for the right upper extremity or an 8 percent whole person. The ratings were based on the Third Edition, (Revised) of the *AMA Guides* except Dr. Delgado noted that the Third Edition, (Revised) of the *AMA Guides* did not directly address myofascial complaints. Nonetheless the doctor attributed 5 percent

for that condition.¹ The Administrative Law Judge adopted and awarded benefits based on Dr. Delgado's opinion.

Functional impairment is the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the *AMA Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein. K.S.A. 44-510e. In workers compensation cases, the law in effect at the time of the injury governs the rights and obligations of the parties. *Osborn v. Electric Corp. of Kansas City*, 23 Kan. App.2d 868, 936 P.2d 297 (1997). For injuries occurring before April 4, 1996, the Third Edition (Revised) of the *AMA Guides* is the version to be utilized. For injuries occurring on or after April 4, 1996, the Fourth Edition of the *AMA Guides* will be utilized. As claimant's injury occurred on December 4, 1995, the appropriate version in effect would be the Third Edition (Revised) of the *AMA Guides*.

All three doctors expressed opinions based upon the Third Edition (Revised) of the *AMA Guides*. Dr. Rodriguez initially rated the claimant based on the Fourth Edition rather than the Third Edition (Revised). Approximately a year later, Dr. Rodriguez again examined claimant and rated her using the appropriate edition of the *AMA Guides*.

Drs. Brown and Delgado measured normal or near normal findings on their range of motion examinations of the claimant. Dr. Brown stated he did not need to utilize a goniometer for the shoulder and cervical range of motion because he could observe claimant's full and complete ability in those regions and there was nothing to measure. Dr. Delgado did measure and note the degree of shoulder and cervical range of motion which resulted in normal and near normal findings.

Conversely, Dr. Rodriguez found significant limitations on claimant's range of motion of the cervical and lumbar spine as well as both shoulders. Dr. Rodriguez measured the range of motion deficits of both shoulders at two separate examinations a year apart. Six range of motion measurements were recorded for each shoulder. It is significant to note that every measurement for each shoulder was identical on the two separate examinations which were conducted a year apart.

Claimant now argues the Administrative Law Judge has failed to properly give consideration to Dr. Rodriguez's opinion. The opinions expressed by Dr. Rodriguez are not persuasive because of the extreme disparity between his range of motion findings and those of the treating physician and the court appointed medical examiner. Moreover, the

¹The Board is mindful that functional impairment is required to be based on the *AMA Guides*, if the impairment is contained therein. See K.S.A. 44-510e(a). However, as in this case, the Board concludes the physician is free to express his personal opinion of functional impairment if the impairment is not contained in the *AMA Guides*. The 5 percent impairment, while not contained in the *AMA Guides*, has been established by competent medical evidence.

validity of those findings is suspect in light of the fact that although a year elapsed between examinations, the numerous measurements of the degree of range of motion deficits in both shoulders remained identical.

The Board agrees the opinion of the physician appointed by the Administrative Law Judge should not be blindly adopted. The physician appointed by the Administrative Law Judge should, on the other hand, be neutral. This does not always mean the rating is most accurate. In this case, the rating by the physician appointed by the Administrative Law Judge corresponds closely with that of the treating physician and appears to appropriately evaluate claimant's impairment. The Board agrees with and affirms the Administrative Law Judge's decision.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated April 18, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Workers Compensation Director